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No. 79-1928

In the

Supreme Court of the United States

OCTOBER TERM, 1979

TULLY CORPORATION OF VIRGINIA,
Petitioner,

vs.

PAMELA S. WINTER, a minor, by PHYLLIS WINTER her mother and next friend,
Respondent.

On Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT

(Italics added)

This petition for writ of certiorari is based on that part of Section 19 of the Rules of the United States Supreme Court which provides that a consideration for granting review on certiorari is:

> "(a) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter . . ."

Petitioner states:

> "The question presented for review is whether the standard for determining if *cotton fabric* is unreasonably dangerous is governed by the decision of the United States Court of Appeals for the Seventh Circuit in this case, or by the conflicting decision of the United States Court of Appeals for the Fifth Circuit in *Simien* v. *S. S. Kresge Co.*, 556 F.2d 551 (5th Cir. 1978) . . ."

> "Review by this Court is warranted in order to resolve the conflict which now exists between Circuits with respect to *whether an ordinary article of apparel is dangerous if it is not chemically flame retarded.*"

These contentions of petitioner are groundless in two respects:

1. A reading of the decisions of the Seventh Circuit in the present case and the Fifth Circuit in *Simien* will disclose that there is no conflict in the principles and standards invoked in each case in determining whether an article of wearing apparel is unreasonably dangerous because of its flammability characteristics.

2. The question decided by the Seventh Circuit in the present case did not concern the standard for determining if *cotton fabric* was unreasonably dangerous. It concerned the issue of whether there was sufficient evidence to warrant a jury in finding a *particular item of clothing made for a seven year old child* was unreasonably dangerous because of certain flammable characteristics which existed in respect to this item of apparel.

A study of the facts of each opinion will show that there simply is no basis for the contention that there is a conflict between the Fifth and Seventh Circuits in respect to "whether an ordinary article of apparel is dangerous if not chemically flame retarded."

The Seventh Circuit opinion carefully distinguished the significant facts in the present case from those in *Simien* in justifying its affirmance of the judgment in favor of the plaintiff here.

The opinion of the Seventh Circuit's comments on the facts and circumstance in support of the judgment and the relevance of the opinion of the Fifth Circuit in *Simien* are, in part:

> "Robert F. Johnson, a professor in the Department of Textiles and Clothing at the University of Minnesota, testified that on the basis of tests which he had performed he was able to conclude that the sweat shirt was unreasonably dangerous. Tests which Johnson considered to be particularly relevant revealed that: *the sweat shirt produced no flame or smoke when it burned which would warn a wearer of danger, the flames could be extinguished only with difficulty, and an intense heat was produced when the fabric burned. Johnson conceded that the fabric satisfied the flammability standard established in the*

Flammable Fabrics Act of 1953 (CS 191-53) but was of the opinion that this was not a valid predictor of a fire hazard. Finally, Johnson testified that *there were four fire retardants available in 1973,* the approximate date of manufacture plaintiff's shirt, *which could have been applied to the sweat shirt* at a cost of 20¢ to 35¢ per yard without impairing the feel of the shirt and without washing out for at least 50 washings. Johnson treated a sweat shirt with one of these retardants, Pyrovatex, and performed tests identical to those which he performed on the untreated shirt. The specifications of these test results are not part of the record but Johnson did conclude that the safety of the sweat shirt had improved. . . .

"Defendant's main argument on the issue of the danger of the sweat shirt revolves around the significance of compliance with CS 191-53. . . . Defendant does not ask this Court to hold that compliance with the federal standard precludes as a matter of law a finding of excessive flammability or improper design. And, in fact, one case which defendant asserts constitutes 'controlling support' for its position holds only that *compliance with CS 191-51 is substantial but not conclusive evidence that the fabric is not defective. . . .*

"Simien v. *S. S. Kresge Co.,* 566 F.2d 551, 556-560 (5th Cir. 1978). In that case, *because plaintiff did not proffer any evidence as to the degree of heat produced by the fire, the difficulty in removing the garment, the availability and effectiveness of flame retardants,* and in the face of uncontroverted evidence that the *fabric was ignited only with difficulty, the court ruled that the defendant that complied with the federal standards was entitled to a judgment as*

a matter of law. This holding is also dependent upon a feature of Texas law which would not permit the trial court to admit into evidence an expert witness's observation that the fabric was unreasonably safe without more evidence constituting the basis of the opinion. Id. at 558) . . .

"From the evidence presented at trial the jury could have found that the *sweat shirt ignited easily, burned rapidly,* and *was difficult to extinguish. There was evidence introduced regarding the age of the child for whom the sweat shirt was designed and the amount of time required for a child to remove a similarly constructed shirt.* We think that it is no answer to assert that the burning characteristics of the sweat shirt were no different from those possessed by the clothing worn by those present in the courtroom. It is the jury's role to weigh conflicting evidence regarding the significance of the test results on burning rates and to determine the credibility of witnesses. . . ."

CONCLUSION

In summary, the opinion of the Seventh Circuit conformed to the orthodox rationale employed by the courts of other federal and state courts in judging whether a garment is unreasonably dangerous because of its flammability characteristics. Those cases, cited in the opinion, are *Raymond* v. *Riegel Textile Corp.*, (1st CA), 484 F. 2d 1025; *LaGorga* v. *Kroger Co.*, (Pa. DC), 275 F. S. 373; *Knab* v. *Alden's Irving Park, Inc.*, 49 Ill. App. 2d 371, 199 N.E. 2d 815, as well as *Simien* v. *Kresge*, 566 F. 2d 551.

The Seventh Circuit, in fact, relies on an extensive and expert summary of the principles and doctrines which are uniformly applied in flammable fabric and apparel cases contained in an article by S. Weinstein, entitled "Flammable Fabrics" in 84 Case and Comment 3 (Nov. 1979).

This article, in the same fashion as did the Seventh Circuit, points out that the factors in judging the dangerous flammability of a fabric, in addition to the availability and feasibility of a flame retardant are: rate of propagation of the fire; ease of ignition; degree of heat generated; difficulty in extinguishing the fire; difficulty in observing the spread of the flames; ease of doffing the garment; and age of the wearer of an item of apparel.

It is respectfully submitted that there is no conflict between the Seventh and Fifth Circuit Courts in respect to the standards and principles to be applied in judging flammable fabric cases so that the petition for writ of certiorari should be denied.

Respectfully submitted,

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